

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
*JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

March 8, 2010

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**RE: Silver Nine, LLC v. Board of Adjustment of the City of Rehoboth  
Beach  
C.A. No. S09A-01-001 ESB  
Letter Opinion**

Date Submitted: October 23, 2009

Dear Counsel:

This is my decision on Silver Nine, LLC's appeal of the denial of its application for a building permit to construct a bulkhead on its rear property line by the Board of Adjustment of the City of Rehoboth Beach.

**STATEMENT OF THE CASE**

Silver Nine owns lots eight and nine in the Silver Lake Shores development in the City of Rehoboth Beach, Delaware. Lots eight and nine are adjacent to each other and border on Silver Lake, a small non-navigable body of water. Silver Nine's existing bulkhead is deteriorating. Silver Nine submitted an application to the City of Rehoboth Beach to construct a bulkhead on its rear property line. The rear property line is actually in Silver Lake and sits about ten feet out from the existing bulkhead. Silver Nine also sought approval to construct a gazebo and pier.

The former building inspector, David Murphy, issued a building permit to Silver Nine

for the bulkhead, gazebo, and pier, but he restricted the construction of the bulkhead to its existing location. Silver Nine twice asked for an amended building permit allowing for construction of the bulkhead on the rear property line. The current building inspector, Terri Sullivan, denied both requests. Sullivan's denial was based upon her interpretation of the zoning code's definition of "structure."<sup>1</sup> "Structure" is defined, in part, as follows:

"Anything constructed or erected, including any part thereof, the use of which requires permanent location on the ground or attachment to something having a permanent location on the ground..."<sup>2</sup>

A structure can not be built in the rear-yard setback.<sup>3</sup> The rear-yard setback is 10 feet.<sup>4</sup> Sullivan concluded that the bulkhead was a structure. Thus, given the prohibition against building structures in the 10-foot rear-yard setback, the bulkhead could not be built on Silver Nine's rear property line. Sullivan also stated that she would not have issued a building permit for the construction of the gazebo and pier, but she did not revoke the former building inspector's approval of the building permit for them.

Silver Nine filed an appeal of the building inspector's decision with the Board. Silver Nine also sought a variance/special exception. The Board held a hearing and denied Silver Nine's appeal of the building inspector's decision and request for a variance/special exception. The Board concluded that the building inspector had correctly interpreted and applied the meaning of "structure." The Board denied Silver Nine's request for a

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<sup>1</sup> Rehoboth Beach C. § 270-4.

<sup>2</sup> *Id.*

<sup>3</sup> Rehoboth Beach C. § 270-42.

<sup>4</sup> Rehoboth Beach C. § 270-25.

variance/special exception, reasoning that Silver Nine had not shown a hardship because it could build a new bulkhead where the existing bulkhead is located. Silver Nine filed an appeal only of the Board's denial of its application to construct the bulkhead on its rear property line. Silver Nine argues that (1) the definition of "structure" does not include a bulkhead, (2) the Board did not consider its argument that the building inspector discriminated against it, and (3) the Board did not make findings of fact and/or conclusions of law in support of its decision.

### **STANDARD OF REVIEW**

The function of the Superior Court on appeal from a decision of a Board of Adjustment is limited to whether the board's decision is supported by substantial evidence and whether the board made any errors of law.<sup>5</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>6</sup> The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>7</sup> It merely determines if the evidence is legally adequate to support the board's factual findings.<sup>8</sup> Absent an error of law, the board's decision will not be disturbed where there is substantial evidence to support its conclusions.<sup>9</sup>

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<sup>5</sup> *Janaman v. New Castle Co. Bd. Of Adj.*, 364 A.2d 1241, 1242 (Del. Super. 1976); *aff'd* 379 A.2d 1118 (Del. 1977); *General Motors Corp. v. Freeman*, 164 A.2d 686 (Del. 1960).

<sup>6</sup> *Wawa, Inc., v. New Castle County Bd. of Adjustment*, 929 A.2d 822, 830 (Del. Super. 2005).

<sup>7</sup> *Id.* at 830.

<sup>8</sup> 29 *Del.C.* § 10142(d).

<sup>9</sup> *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

## DISCUSSION

### 1. The Meaning of Structure

Silver Nine argues that the zoning code's definition of "structure" does not include a bulkhead, reasoning that a bulkhead is more like a fence or wall. Section 270-4 of the zoning code defines "structure" as follows:

Anything constructed or erected, including any part thereof, the use of which requires permanent location on the ground or attachment to something having a permanent location on the ground, including, but without limiting the generality of the foregoing, house trailers, mobile homes, relocatable homes, signs, swimming pools, porches, balconies, decks, canopies, fences, backstops for tennis courts, pergolas, gazebos, heating, ventilating and cooling devices, compressors or pumps and showers, and excluding driveways and sidewalks.<sup>10</sup>

Section 270-42 of the zoning code states that:

No structure and no part of a structure shall be erected within or shall project into the required yard area, except:

- A. Cornices, eaves, gutters, chimneys, steps or entries projecting from the main structure no more than 24 inches.
- B. Fences and screens, subject to the provisions of § 270-43.

Section 270-25 of the zoning code states that the minimum depth of the rear yard must be 10 feet.

The definition of "structure" is very broad. Only driveways and sidewalks are explicitly excluded from the definition of "structure." The zoning code prohibits any structures from being built in the 10-foot rear-yard setback except for certain things projecting from a structure, fences and screens. This broad definition of "structure," combined with the prohibition against building a structure in the 10-foot rear-yard setback,

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<sup>10</sup> Rehoboth Beach C. § 270-4.

reflects the City of Rehoboth Beach's desire to tightly control what may be built in the 10-foot rear-yard setback. "Bulkhead" is not defined in the zoning code. The Delaware Department of Natural Resources defines a "bulkhead" as "a vertical walled structure or partition intended to retain or prevent sliding of the land, or to provide an interference between land activities and those which occur in the water..."<sup>11</sup>

There is nothing ambiguous about the zoning code's definition of "structure." Given the broad definition of "structure" and the definition of a "bulkhead" as a particular type of structure, it is only logical that a bulkhead is a structure and, as such, can not be located in the 10-foot rear-yard setback.

Silver Nine argues that a bulkhead is not a structure, but a wall or fence. A "fence" is defined by the zoning code as "any artificially constructed barrier of any materials or combination of materials, except for barbed wire and similar materials, erected to enclose or screen areas of land, but not including a wall. A "wall" is defined by the zoning code as a "structure of brick, masonry or similar materials erected so as to enclose or screen areas of land."<sup>12</sup> Given the definitions of "bulkhead," "fence" and "wall," it is obvious that these are three different things. A bulkhead is designed to separate the ground from the water, while fences and walls are designed to enclose or screen areas of land. The Board's decision is correct.

## **2. Discrimination**

Silver Nine argues that the Board did not consider its argument that the building

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<sup>11</sup> State of Delaware, Dept. of Nat. Res. and Environ. Control, Marina Regulations, Appendix X (1993).

<sup>12</sup> Rehoboth Beach C. § 270-4.

inspector discriminated against it. This argument is based on the fact that there are some properties in the City of Rehoboth Beach that have bulkheads built on their rear property lines. When asked to explain this at the hearing, the current building inspector said that she had only been on the job for a short time and, therefore, did not know why some properties had bulkheads built on their rear property lines. She added that she had never approved a request to build a bulkhead on a rear property line. No witness at the hearing was able to explain this situation and the Board did not address it.

The Board's authority and powers are clearly defined. In the City of Rehoboth Beach, any person aggrieved by a decision of the building inspector may file an appeal with the Board. The Board has the authority to hear and decide appeals where the appellant alleges that there is an error in any order, requirement, decision or determination made by the building inspector in the enforcement of this chapter or by any ordinance supplemental hereof.<sup>13</sup>

The building inspector concluded that the definition of "structure" includes a bulkhead. The Board only had the authority to determine if the building inspector made an error in her interpretation of the zoning code's definition of "structure."<sup>14</sup> I have addressed that issue and concluded that the building inspector did not make an error. The Board does not have the authority to address whether the building inspector discriminated against Silver Nine. Thus, it was appropriate for the Board not to consider Silver Nine's argument.

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<sup>13</sup> Rehoboth Beach C. §§ 270-71 and 74.

<sup>14</sup> *Eastern Shore Environmental v. Kent County Department of Planning*, 2002 WL 244690, at \*5 (Del. Ch. Feb. 1, 2002).

### **3. The Board's Decision**

Silver Nine argues that the Board did not make findings of fact and/or conclusions of law to support its decision. This is not a case where there are conflicting facts. There is only one set of facts and they are not in dispute. This case instead involved the application of the definition of “structure” to the undisputed facts. Silver Nine is really arguing that the Board did not adequately explain its decision. The Board does have to logically explain its decision.<sup>15</sup> In reaching their conclusions, the individual Board members clearly adopted the building inspector’s definition of “structure” to include “bulkhead.” Two members upheld the building inspector’s decision because they felt “there is not a basis for finding error in the decision that the building inspector made.”<sup>16</sup> One member stated “it falls within the definition of structure as stated.”<sup>17</sup> Another member found “the building instructor’s(sic) arguments and position is sound and well-supported.”<sup>18</sup> The fifth member of the Board agreed “with the building inspector that she followed the code.”<sup>19</sup> The Board members, after reviewing the zoning code’s definition of “structure” and the building inspector’s explanation of her decision, concluded that the building inspector correctly interpreted the definition of “structure” as including a bulkhead. This is an adequate explanation of the Board’s rationale for its decision.

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<sup>15</sup> *Kwik-Check Realty Co. v. Bd. of Adjustment of New Castle County*, 369 A.2d 694, 699 (Del. Super. 1977).

<sup>16</sup> Tr. at 53-54.

<sup>17</sup> Tr. at 53.

<sup>18</sup> Tr. at 54.

<sup>19</sup> *Id.*

## **CONCLUSION**

The decision by the Board of Adjustment of the City of Rehoboth Beach is  
AFFIRMED.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley